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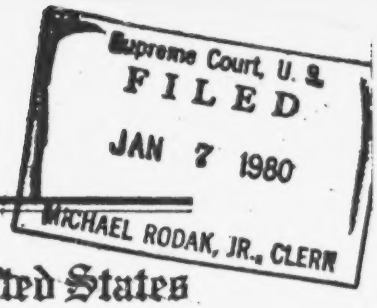

In the Supreme Court of the United States

OCTOBER TERM, 1979

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ASSOCIATED DRY GOODS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

ASSOCIATED DRY GOODS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Equal Employment Opportunity Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-13a) is not yet officially reported. The opinion of the district court (App. D, *infra*, 16a-32a) is reported at 454 F. Supp. 388.

JURISDICTION

The judgments of the court of appeals (Apps. B and C, *infra*, 14a-15a) were entered on October 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Sections 706(b) and 709(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5 (b), and 2000e-8(e), prohibit the Equal Employment Opportunity Commission, prior to the institution of a suit, from disclosing information obtained during its investigation of a charge to the parties immediately involved in the charge.

STATUTES AND REGULATIONS INVOLVED

Section 706(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(b), provides in pertinent part:

> Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. * * * If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or

> used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. * * *

Section 709(e) of Title VII, 42 U.S.C. 2000e-8(e), provides:

> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

Section 1601.22 of the Equal Employment Opportunity Commission regulations, 29 C.F.R. 1601.22, provides:

> Neither a charge, nor information obtained pursuant to section 709(a) of Title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to section 709(c) and (d) of Title VII, shall be made matters of public information by the Commission prior to the institution of any proceedings under this Title involving such charge or information. This provision does not apply to such earlier disclosures to charging parties, or

> their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief. This provision also does not apply to such earlier disclosures to representatives of interested Federal, State, and local authorities as may be appropriate or necessary to the carrying out of the Commission's function under Title VII, nor to the publication of data derived from such information in a form which does not reveal the identity of charging parties, respondents, or persons supplying the information.

Section 1610.17(d) of the Commission's regulations, 29 C.F.R. 1610.17(d), provides:

> Special disclosure rules apply to the case files for charging parties, aggrieved persons on whose behalf a charge has been filed, and entities against whom charges have been filed. The special disclosure rules are available in the public reading areas of the Commission. Under sections 706 and 709, case files involved in the administrative process of the Commission are not available to the public.

Disclosure provisions of the EEOC Compliance Manual are set forth in Appendix E, *infra*, 33a-46a.

STATEMENT

1. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255, prohibits employment discrimination based on an individual's race, color, religion, sex or national origin. 42 U.S.C. 2000e-2. The Act created the Equal Employment Opportunity

Commission and empowered it to prevent unlawful employment practices. 42 U.S.C. 2000e-4 and 2000e-5. An aggrieved person may file with the Commission a charge of employment discrimination, which the Commission must investigate and which, under Section 706(b), may not be "made public." 42 U.S.C. 2000e-5(b). If after such investigation the Commission determines that there is reasonable cause to believe the charge is true, it must endeavor to eliminate the unlawful practice through "informal methods of conference, conciliation, and persuasion." *Ibid.* "Nothing said or done during and as a part of such informal endeavors," however, "may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned." *Ibid.*

In connection with its investigation of a charge, the Commission is entitled under Section 709(a) to inspect and copy any evidence of any person being investigated or proceeded against that relates to the alleged employment practice. 42 U.S.C. 2000e-8(a). Employers must maintain records prescribed by the Commission relevant to the determinations of whether unlawful employment practices have been or are being committed. 42 U.S.C. 2000e-8(c). Section 709(e) prohibits "the Commission [from making] public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any [civil action] involving such information." 42 U.S.C. 2000e-8(e).

The Commission's regulations provide that charges and investigative information shall not be made matters of public information by the Commission prior to any civil enforcement action involving such charge or information. 29 C.F.R. 1601.22. "This provision," however, "does not apply to such earlier disclosures to charging parties, or their attorneys, respondents or their attorneys, or witnesses where disclosure is deemed necessary for securing appropriate relief." *Ibid.* In addition, after dismissal of a charge or after the expiration of the 180-day period for investigation and conciliation of charges, the Commission permits access to the investigative file by complainants and their attorneys in connection with pending or "contemplated litigation" (App. E, *infra*, § 83.3(a)).[1] Persons to whom disclosure is made must sign an EEOC form agreement not to disclose the information obtained from the Commission (*id.* at § 83.4). This petition presents the question of the validity of these disclosure provisions.

2. From 1971 through 1973 several charges of employment discrimination by individual employees and former employees of Joseph Horne Company ("Horne's"), a division of Associated Dry Goods Corporation, were filed with the Commission (App. D, *infra*, 17a). Pursuant to Section 709, the Commission requested Horne's to disclose employment information relating to the charges (*ibid.*). Horne's

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[1] Access may also be permitted prior to the expiration of the 180 days upon a showing of "compelling need for access." *Ibid.*

refused to furnish the materials unless the Commission provided written assurance that the information contained in the records would not be disclosed to the charging parties, their counsel, or persons interviewed during the Commission's investigation (*ibid.*). The Commission refused, explaining that, although it does not disclose all information received from an employer, some disclosure to the charging party is necessary to analyze or clarify data and that parties who contemplate filing suit and their counsel are allowed limited access to the Commission's investigative files. Such persons must agree not to make the information public (*ibid.*). 29 C.F.R. 1601.22.[2]

The Commission subsequently issued a subpoena *duces tecum* to obtain the requested information (App. D, *infra*, 18a). Without complying, Associated filed this action for declaratory and injunctive relief in the United States District Court for the Eastern District of Virginia, challenging the validity of the Commission's regulations and procedures allowing disclosure of information to charging parties and their attorneys prior to suit, including disclosure made during the course of investigating and conciliating a charge (*ibid.*). The suit was subsequently consolidated with an action filed by the Commission

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[2] In October 1977, the regulation, which since 1966 had authorized disclosure to the immediate parties, witnesses and interested governmental authorities, was amended to include disclosure to the parties' attorneys, as had been the Commission's prior informal practice. 42 Fed. Reg. 55392 (1977).

in the United States District Court for the Western District of Pennsylvania to enforce its subpoena. Associated contended in both suits that the Commission's limited disclosure rules violated the prohibitions in Sections 706(b) and 709(e) against making information obtained by the Commission "public" prior to the institution of a suit.

The district court enforced the subpoena but held that the Commission's disclosure procedures are invalid (App. D, *infra*, 16a-32a). It concluded that limited disclosure to charging parties and their attorneys is a prohibited disclosure to the "public" (*id.* at 22a-25a). The court of appeals affirmed over the dissent of Judge Hall (App. A, *infra*, 1a-13a). The majority adopted the reasoning of *Sears, Roebuck & Co.* v. *Equal Employment Opportunity Commission*, 581 F.2d 941 (D.C. Cir. 1978), and *Burlington Northern, Inc.* v. *Equal Employment Opportunity Commission*, 582 F.2d 1097 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979), both of which held that the prohibitions on public disclosure prohibit the Commission from releasing to individual charging parties investigative materials obtained in nationwide investigations of multiple charges (including commissioner's charges) against the same employers. The court of appeals refused to follow the decision in *H. Kessler & Co.* v. *Equal Employment Opportunity Commission*, 472 F. 2d 1147 (5th Cir.) (*en banc*), cert. denied, 412 U.S. 939 (1973), which held that disclosure to charging parties of information relating to their own individual charges is not disclosure to the public within

the meaning of Sections 706(b) and 709(e). Rejecting the EEOC's contention that its investigation and conciliation functions would be frustrated if it could not disclose information to the persons directly involved in a charge, the court stated that necessary corroboration of information may "easily be obtained" by interrogating employees and witnesses on the basis that " 'it has been said' or 'it has been reported' without providing them with letter and verse of the employer's contentions * * *" (App. A, *infra*, 6a).

Judge Hall dissented on the ground that the limited disclosure authorized by the Commission to immediate parties involved best served the purposes of the Act. "Once a private action has been brought under Title VII," he observed, "the statute imposes no restrictions on the public dissemination of relevant material in the EEOC files, except for conciliation information" (App. A, *infra*, 10a). He agreed with the Commission that disclosure before suit "discourage[s] meritless litigation, by informing potential litigants of the weakness of their cases * * *" (*id.* at 10a-11a).

REASONS FOR GRANTING THE PETITION

1. There is an irreconcilable conflict among the circuits. In *H. Kessler & Co.* v. *Equal Employment Opportunity Commission*, 472 F.2d 1147, cert. denied, 412 U.S. 939 (1973), the Fifth Circuit, sitting en banc, held that the word "public," in each of the three places it appears in Sections 706(b) and 709(e),

refers to disclosures to the public at large and does not refer to disclosures to the immediate parties or their counsel. As here, *Kessler* arose after an employer refused to comply with an investigative demand. The Commission brought suit to enforce the demand, and the employer sued to quash it, among other reasons, because the Commission's policy was to allow investigative material to be turned over to the charging party's counsel. See 53 F.R.D. 330, 340 (N.D. Ga. 1971). On appeal, the Fifth Circuit's *en banc* decision rejected the employer's argument and approved the Commission's practice of disclosing materials to "the charging party, the respondent, witnesses, and representatives of interested Federal, State and local agencies as may be appropriate or necessary to the carrying out of the Commission's functions * * *" and to "counsel for the charging party after expiration of the statutory period for investigation and conciliation (60 days [now 180 days] from the date of filing with the Commission) to determine whether or not, in counsel's opinion, the facts justify the commencement of a civil action * * *." 472 F.2d at 1149. These are the same practices, reviewed in the same procedural posture, that were held invalid by the decision below.[3]

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[3] *Kessler* is also at odds with *Sears, Roebuck and Co.* v. *Equal Employment Opportunity Commission*, 581 F.2d 941 (D.C. Cir. 1978), and *Burlington Northern, Inc.* v. *Equal Employment Opportunity Commission*, 582 F.2d 1097 (7th Cir. 1978), cert. denied, 440 U.S. 930 (1979), although those decisions arose in a different factual context. In *Sears* and *Burlington Northern* the investigative files at issue were the

2. The decision below is incorrect. The Commission has a statutory responsibility to attempt to negotiate settlements between employers and employees. 42 U.S.C. 2000e-5(b). To this end, the Commission necessarily must disclose investigative materials. Senator Humphrey, when introducing the nondisclosure provision that was eventually enacted, explained that the ban on public disclosure was "a ban on publicizing" and did not prohibit "such disclosure as is necessary to the carrying out of the Commission's duties under the statute." 110 Cong. Rec. 12723 (1964). He added (*ibid.*):

> Obviously, the proper conduct of an investigation would ordinarily require that the witnesses be informed that a charge had been filed and often that certain evidence had been received. Such disclosure would be proper. The amendment is not intended to hamper Commission investigations or proper cooperation with other State and Federal agencies, but rather is aimed at the making available to the general public of unproven charges.

As the *Kessler* court pointed out (472 F.2d 1151), although the term "make public" is not defined in the Act, it is used in a manner that supports the Commis-

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Commission's "nationwide files" on the employers which contained information concerning more than the circumstances of the charging party's employment. Both cases, moreover, involved the additional issue of whether Section 709(e) prohibits disclosure to the named plaintiffs in actual or threatened class actions comprehending employees allegedly discriminated against.

sion's interpretation of the term. Section 706(b), 42 U.S.C. 2000e-5(b), states that the Commission shall furnish the employer with "a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice)," but such "[c]harges shall not be made public." The same section further provides that the Commission shall undertake to conciliate charges but that nothing said or done as a part of the conciliation proceedings "may be made public by the Commission * * * without the written consent of the persons concerned." Since the employer is thus to be informed about the charge, and since the employer and the aggrieved person must be parties to any conciliation, both the charge and matters arising in the course of conciliation proceedings will necessarily be known or made known to both the charging party and the employer. Accordingly, the the term "public" in Section 706(b) plainly contemplates persons other than the charging party and the employer. There is no suggestion that the term was meant to carry a different meaning when used in Section 709(e). Accordingly, the term "make public" throughout Title VII should not be read to prohibit disclosures to the employer, the charging party, and their counsel.[4]

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[4] In support of its decision, the court below incorporated by reference the reasoning of the Seventh and D.C. Circuits in *Sears* and *Burlington Northern*. Those opinions are unpersuasive. First, *Burlington Northern* suggested that disclosure of materials in the investigative file would stir up litigation. 582 F.2d at 1100. At least as applied to individual charging parties, however, it is a failure to disclose that could well

3. The issue is of substantial importance. The court below made clear, as the courts in *Sears* and *Burlington* did not, that under its interpretation of Sections 706(b) and 709(e) the Commission is even

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have that effect. If individual charging parties could not obtain materials in the Commission's files until after they have brought suit, they might well be encouraged to use litigation as an investigative tool and to postpone serious settlement negotiations until after suit has been filed and the Commission's investigative materials have been obtained. Second, contrary to the suggestion of the court of appeals in *Burlington Northern*, the 1972 amendments to the Civil Rights Act did not in any way undermine the rationale of the *Kessler* decision. The language of Section 709(e) was not changed, and there is no reason to suppose that Congress intended to alter the scope of its ban on publicizing investigative materials. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 354 n.39 (1977). With respect to conciliation, Congress changed the language of former Section 706(a), 42 U.S.C. (1970 ed.) 2000e-5(a), which permitted disclosure upon the "consent of the parties," to the present language of Section 706(b), which requires the "consent of the persons concerned." There is no explanation in the legislative history for this change and no suggestion that a modification in substance was intended. The court's suggestion that Congress in 1972 intended private employment discrimination actions to play a less prominent role in civil rights enforcement is erroneous. Congress in 1972 was careful to preserve the private right of action. See *Occidental Life Insurance Co.* v. *Equal Employment Opportunity Commission*, 432 U.S. 355, 361-366 (1977). This Court noted in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974), that even after the 1972 amendments gave enforcement authority to the Commission, "the private right of action remains an essential means of obtaining judicial enforcement of Title VII." For a critique of the various arguments adopted in *Sears* and *Burlington Northern*, see Comment, *The Meaning of "Public" in Section 709(e) of the 1964 Civil Rights Act and Access to Information Gathered by the EEOC,"* 67 Ky. L. J. 430 (1978-1979).

prohibited from revealing any information about a charge to the immediate parties during the investigation and conciliation of the charge.[5] This ruling will impose a severe restraint on the Commission's process of conciliation. In 1977, the Commission adopted a conciliation procedure under which, after obtaining a statement from charging parties and requesting answers to interrogatories from the employers, it invites charging parties and employers to a fact-finding conference. This procedure has resulted in the settlement of far greater numbers of charges than had previously occurred, but, under the decision of the court of appeals, its effectiveness would be greatly impaired because disclosures by the Commission to the parties during these conferences would be unlawful, in the absence of consent.[6]

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[5] The court's view that information may not be disclosed to facilitate the investigation or conciliation of a charge is manifest in its conclusion that the prohibitions on disclosure will not unduly restrict Commission investigations because corroborative information can be obtained by indirect methods, without direct disclosure of investigative materials (App. A, *infra*, 6a).

[6] The new fact-finding procedure was first instituted in the EEOC district offices in Baltimore, Dallas and Chicago. In one year's time the proportion of negotiated settlements out of all charges filed rose in these regions from 14% to 48%. See EEOC, Report on Results in Model Offices Testing New Charge Processing Systems 1 (Sept. 1977-1978). Already some employers in the Fourth Circuit have refused to attend fact-finding conferences on the ground that this would result in disclosure of investigative material.

We assume that investigative materials could be disclosed with consent, although Section 709(e) does not specifically so

Moreover, the work of an investigator is obviously frustrated if facts given by one party cannot be presented to the other for verification or denial. On the basis of its experience, the Commission believes that, unless it has the ability to name names or show documentary evidence, rather than having to rely entirely on the sort of circumlocutions suggested by the opinion below (see App. A, *infra*, 6a),[7] the parties often will not accept statements made to them by EEOC investigators, for purposes of either investigation or settlement. Conciliation would be especially hampered because the Commission would be prohibited from disclosing information to enable the parties to appreciate the merits of the charge, to assess the strengths and weaknesses of their respective positions, and to evaluate the terms of a settlement proposal. Moreover, under the court of appeals' decision, the Commission would be unable to disclose, as it normally does in its reasonable-cause decisions, the facts underlying its finding that there is probable cause to believe the charge is true.

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provide. It cannot be assumed, however, that both parties to a charge will consent to full unconditional disclosure at the discretion of the Commission.

[7] If the "public" in fact includes the immediate parties, we question whether the indirect methods of obtaining corroborative evidence suggested by the court—inquiring by stating that "it has been said"—are permitted under the court's construction of Section 709(e). That section states that the Commission may not "make public *in any manner whatever* any information obtained * * *." 42 U.S.C. 2000e-8(e) (emphasis supplied).

It is essential to the effective functioning of the Commission that the conflict in decisions concerning information the Commission can and cannot reveal be resolved. As a result of the conflicting decisions, the Commission has different disclosure rules in effect in different circuits regarding both the disclosure of information during its conciliation and investigative proceedings and the disclosure of materials in its investigative files to charging parties for the purpose of bringing suit. Particularly in view of the fact that Sections 706(b) and 709(e) impose criminal penalties on Commission employees for prohibited disclosure, the uncertainty and confusion resulting from the conflicting decisions should be resolved.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1980

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78-1695

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLEE

v.

JOSEPH HORNE COMPANY, A Division of Associated Dry Goods Corporation, APPELLANT

No. 78-1696

ASSOCIATED DRY GOODS CORPORATION, APPELLEE

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond, Robert R. Merhige, Jr., District Judge

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Argued April 4, 1979 Decided October 10, 1979

Before HAYNSWORTH, Chief Judge, and WINTER and HALL, Circuit Judges.

WINTER, Circuit Judge:

In these consolidated cases, the Equal Employment Opportunity Commission (EEOC) sought to enforce its administrative subpoena *duces tecum* to obtain information about the employment practices of Joseph Horne Company (Horne), a wholly owned subsidiary of Associated Dry Goods Company (Associated) with regard to race and sex, and Associated sought to challenge the validity of certain practices of EEOC relating to disclosure of EEOC investigative files to charging parties both by a suit for declaratory and injunctive relief and by resistance to the subpoena. The district court held that the EEOC procedural regulations set forth in 29 C.F.R. §§ 1601.20 and 1601.17(d) and the special disclosure rules contained in § 83 of the EEOC Compliance Manual were void, invalid and unenforceable to the extent that they authorize EEOC to disclose to charging parties any information in EEOC investigative files. It therefore enjoined such disclosures and it granted enforcement of the subpoena subject to this restriction on the use of the data to be obtained. Finally, Associated's request for attorneys' fees was denied.

Both parties appeal, and we affirm.

I.

From November 1971 through June 1973, several employees and former employees of Horne filed race

and sex discrimination charges with EEOC. The latter undertook to investigate the charges and it served interrogatories on Horne, seeking relevant information. Horne, however, refused to answer the interrogatories without assurances from EEOC that the answers would not be disclosed to the charging parties, their attorneys, or others. EEOC's view of its authority and its policy is directly to the contrary, *see* 29 C.F.R. §§ 1601.20 (current version at 29 C.F.R. § 1601.22) and 1601.17(d); § 83 of EEOC Compliance Manual, and it declined to give the requested assurances. EEOC therefore issued a subpoena *duces tecum* to obtain the information. Horne petitioned EEOC to revoke the subpoena. At the time, EEOC had three commission members, two of whom affirmatively approved the decision not to revoke it. When Horne's petition was denied, Horne did not comply with the subpoena; but Associated filed an action challenging the Commission's disclosure policies and seeking declaratory and injunctive relief. EEOC in turn instituted suit to enforce compliance with its subpoena and the cases were consolidated and decided together.

II.

The first issue that we must address is Associated's argument that the subpoena was invalidly issued because EEOC lacked a quorum when it denied Horne's petition to revoke the subpoena. Its argument is premised upon the fact that the Commission has a statutory size of five members, 42 U.S.C. § 2000e-4 (a), with a direction that three shall constitute a

quorum, 42 U.S.C. § 2000e-4(c), and the record shows that only two commissioners voted in writing to deny the petition to revoke the subpoena, notwithstanding that 29 C.F.R. § 1601.15(b) (1975) in effect at the time provided that a petition to revoke a subpoena shall be reviewed by the Commission. The district court was of the view that since the two votes approving denial of the petition would likely have prevailed in any event, any absence of the third member was immaterial and only a *de minimis* deviation from EEOC's then regulation.

We are in essential agreement with the district court. We have heretofore approved the validity of the regulation which permits the Compliance Director's determination of whether to permit a subpoena to issue to prevail unless the Commission decides otherwise. EEOC v. South Carolina National Bank, 562 F.2d 329, 333 (4 Cir. 1977). Under the regulation, the members of the Commission need take affirmative action only if they conclude to reverse the Compliance Director's determination. Here the record shows that a majority of the then Commission voted to sustain issuance of the subpoena so that the subpoena would have issued regardless of the vote of the third member. Since we view a vote on the correctness of the Compliance Director's determination not a consultive act requiring an exchange of views, we think it makes no difference to the validity of the subpoena that the record does not show a vote by the third member.

III.

The Commision appeals from the determination that the disclosure to charging parties and their attorneys of investigative materials prior to suit is in violation of 42 U.S.C. § 2000e-5(b) and 2000e-8(e), and therefore 29 C.F.R. §§ 1601.20 (current version at 29 C.F.R. § 1601.22) and 1601.17(d) and the special disclosure rules of § 83 of EEOC Compliance Manual are void to the extent that they provide otherwise.

The restrictions upon disclosure by EEOC of investigative information contained in §§ 2000e-5(b) and 2000e-8(e) and their effect upon the validity of EEOC's regulations and Compliance Manual have been thoroughly considered by three Courts of Appeals with conflicting conclusions. The Fifth Circuit in H. Kessler & Co. v. EEOC, 472 F.2d 1147 (5 Cir. 1973) (in banc), a case on which EEOC heavily relies, held that charging parties and their attorneys are not members of the "public" within the meaning of the restrictive statutory language and consequently the regulations and the Compliance Manual do not exceed the statute and thus are valid and enforceable. The District of Columbia Circuit in Sears, Roebuck & Co. v. EEOC, 581 F.2d 941 (D.C. Cir. 1978), a case on which the district court in the instant case relied, and the Seventh Circuit in Burlington Northern, Inc. v. EEOC, 582 F.2d 1097 (7 Cir. 1978), *cert. denied*, —— U.S. —— (February 21, 1979), reached the opposite conclusion. While *Sears* and *Burlington*

attempted to distinguish *Kessler* (unpersuasively, we think), they also declined to follow it if it were indistinguishable.

The analysis of the legal arguments, the legislative history and the policy considerations on both sides of the question are so fully developed in *Kessler*, *Sears* and *Burlington* that we see little purpose in repeating them here, except to comment on two arguments of EEOC which are made to us. First, EEOC contends that a decision prohibiting EEOC from disclosure will unduly restrict it in conducting an investigation as, for example, when EEOC seeks corroboration from the individuals concerned of information supplied by their employer that their qualifications for the position to which they were promoted or for which they were hired were superior to those of the charging party who was not promoted or hired. We think that such corroboration may easily be obtained without violating the statutory restrictions by interrogating those employees on the basis that "it has been said" or "it has been reported" without providing them with letter and verse of the employer's contentions or the specific identity of the representative of the employer advancing the contention. Second, we do not view our decision in Charlotte-Mecklenburg Hospital Authority v. Perry, 571 F.2d 195 (4 Cir. 1978), as supporting EEOC's position in the instant case. That case arose under the Freedom of Information Act and the parties did not dispute the then judicial and administrative construction of Title VII permitting disclosure of investigative files to the

party charged and the charging party. The instant case presents the dispute and we resolve it by following the District of Columbia and the Seventh Circuits.

We therefore hold that §§ 2000e-5(b) and 2000e-8(e) prohibit EEOC from disclosing investigative materials to the parties prior to suit. The provisions of the regulations and the Compliance Manual purporting to authorize such disclosures are invalid and unenforceable.

IV.

For the reasons assigned by the district court, we see no merit in Associated's contentions that enforcement of the subpoena should be forbidden because of EEOC's delay or misconduct in causing it to be issued, or because a charging party (Alice M. Corvino) filed suit to redress the discrimination allegedly practiced by Horne against her. Manifestly, in the view that we take of the case, the district court was correct in denying Associated counsel fees.

AFFIRMED.

HALL, Circuit Judge, concurring in part and dissenting in part:

I concur in that portion of the majority opinion which grants enforcement of the EEOC subpoena and denies the attorney fees requested by Horne, but dissent from the majority's invalidation of the EEOC disclosure rules.

The EEOC rules at issue allow an individual who files an employment discrimination charge with the agency, and who is considering pursuing his complaint through private litigation, to inspect portions of the material the agency has gathered in the course of investigating his charge. The majority now holds that this disclosure violates the command of 42 U.S.C. §§ 2000e-5(b) and 2000e-8(e) that the agency shall not "make public" the results of its investigations until litigation involving the information has begun. The majority adopts the analyses of *Sears, Roebuck & Co.* v. *EEOC*, 581 F.2d 941 (D.C. Cir. 1978) and *Burlington Northern, Inc.* v. *EEOC*, 582 F.2d 1097 (7th Cir. 1978), cert. denied 99 S.Ct. 1267 (1979), decisions based not so much on the language of the statute [1] as on the courts' belief that disclosure would

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[1] Neither the language of the statute nor its history addresses the issue of whether the charging party is a member of the "public" to whom disclosure is forbidden. The Fifth Circuit, sitting *en banc* and construing essentially the same statutory language, concluded that the term "public" does not include the charging party. *H. Kessler & Co.* v. *EEOC*, 472 F.2d 1147 (5th Cir. 1973) (en banc), cert. denied 412 U.S. 939. See also *Charlotte-Mecklenburg Hospital Authority* v. *Perry*, 571 F.2d 195 (4th Cir. 1978), in which this court ordered the disclosure of EEOC investigatory material to a party charged with discrimination, apparently accepting the plaintiff's uncontested argument that the language of Title VII "suggests a manifest distinction between, on the one hand, right of disclosure to the public generally, and, on the other hand, a right of disclosure to the parties themselves . . . [D]isclosure to the parties—whether to the party charged or to the charging party—is not within the prohibitions of Title VII." 571 F.2d at 199.

encourage private litigation and "necessarily undercut the preferred enforcement scheme of comprehensive negotiation and settlement." *Burlington Northern*, 582 F.2d at 1100. I believe that these decisions are predicated upon a fundamental misconception of both the importance of private litigation in Title VII enforcement and the impact of the disclosure rules on the conciliation process.

The Commission's disclosure rules, to the extent that they allow a charging party access to his own case file,[2] are narrow in scope. Disclosure of the file contents is permitted only "in connection with pending or contemplated litigation." EEOC Compliance Manual § 83.3(a). No disclosure is made prior to the beginning of the 90-day period during which a private action may be brought, absent a showing of "compelling need." *Compare* 42 U.S.C. § 2000e-5(f)(1) *with* EEOC Compliance Manual § 83.3(a). Certain types of information are expunged from the case file before it is disclosed, including the identities and statements of witnesses who have been promised confidentiality by the Commission, and all information concerning the Commission's attempts to settle the

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[2] The rules also permit the charging party to inspect files containing other charges against the same respondent which allege similar types of discrimination. EEOC Compliance Manual § 83.7(c). I believe that this constitutes "publicizing" the other files, and that this disclosure, prior to litigation involving the information, is forbidden by the statute. I would invalidate the disclosure rules only insofar as they allow a party access to other case files.

charge through conciliation.[3] *Id.* § 83.6. Once a private action has been brought under Title VII, the statute imposes no restrictions on the public dissemination of relevant material in the EEOC files, except for conciliation information. Therefore, in most cases the practical effect of the disclosure rules is to allow access to investigatory material 90 days, at most, before it would otherwise be disclosed.

I do not believe that such a limited disclosure of information would have the dire effects predicted by the *Sears* and *Burlington Northern* courts.[4] The Commission contends that the disclosure rules discourage

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[3] The employer in this case contends that confidential business data is included in the materials disclosed by the Commission, although it offers no substantiation for this claim. Regardless of whether the Commission's disclosure rules specifically exempt legitimate trade secrets and other confidential business information, disclosure of such material is forbidden by 18 U.S.C. § 1905, and the Administrative Procedures Act provides an adequate remedy for threatened violations of this statute. *See Chrysler Corp.* v. *Brown,* 99 S.Ct. 1705 (1979).

[4] In addition to fear that the disclosure rules undercut the Commission's settlement efforts, the *Sears* court expressed concern that the Commission could not enforce the agreements it requires as a condition of disclosure, which prohibit the charging party from public dissemination of the information. EEOC Compliance Manual § 83.3(b). "[C]ounsel for the Commission asserted that the EEOC . . . could seek to enjoin parties from violating their agreement . . . . When pressed, however, counsel could point to no instance when this had been done." 581 F.2d at 946. This may be explained by the Commission's uncontested assertion in this court that there has never been a violation of the agreement in the 13 years during which the rules have been in effect.

meritless litigation, by informing potential litigants of the weakness of their cases, and that meritorious suits which may be encouraged by the rules complement, rather than hinder, its own enforcement efforts. I find this assessment by the agency responsible for enforcing Title VII, based on thirteen years of experience with the disclosure rules in practice, more persuasive than speculation engaged in by the courts. *Cf. Cannon* v. *University of Chicago*, 99 S.Ct. 1946, 1962-1963 (1979).

The *Sears* and *Burlington Northern* decisions, which the majority now adopts, are premised upon a concept of private litigation as the ugly stepchild in the Title VII scheme, to be discouraged whenever possible.[5] But private litigation has been an integral

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[5] This theory is criticized, based upon a thorough review of the legislative history of Title VII, in *The Meaning of "Public" in Section 709(e) of the 1964 Civil Rights Act and Access to Information Gathered by the EEOC*, 67 Ky. L.J. 430 (1978-79).

The congressional explanation of the need for the 1972 Amendments casts doubt upon the *Sears* and *Burlington Northern* courts' faith in voluntary conciliation as the preferred means of ending discrimination:

> During the preparation and presentation of Title VII of the Civil Rights Act of 1964 . . . [i]t was thought that a scheme which stressed conciliation rather than compulsory processes would be more appropriate for the resolution of this essentially "human" problem. Litigation, it was thought, would be necessary only on an occasional basis in the event of determined recalcitrance. Experience, however, has shown this to be an oversimplified expectation, incorrect in its conclusions . . . [T]he Commission has been able to achieve successful conciliation

part of the Title VII enforcement scheme since the statute's enactment in 1964. The 1972 Amendments strengthened the Commission's own enforcement powers, but also encouraged private actions through provisions for appointment of counsel and commencement of actions without payment of fees, costs or security. In retaining private litigation as a critical enforcement tool, Congress emphasized that "[t]he primary concern must be protection of the aggrieved person's option to seek a prompt remedy in the best manner available." H.R. Rep. No. 238, 92nd Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2148.

Congress also recognized that "the nature of Title VII actions more often than not pits parties of unequal strength and resources against each other. The complainant, who is usually a member of a disadvantaged class, is opposed by an employer who not infrequently is one of the nation's major producers, and who has at his disposal a vast array of resources and legal talent." *Id.* at 2148. This disparity is increased by the fact that "the entire area of employment discrimination is one whose resolution requires not only expert assistance, but also the technical perception that a problem exists in the first place, and

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in less than half of the cases in which reasonable cause was determined. It has been the emphasis of voluntariness that has proven to be most detrimental to the successful operation of Title VII. H.R. Rep. No. 238, 92nd Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2137, 2143-2144.

that the system complained of is unlawful." *Id.* at 2144. The disclosure rules, in recognition of this difficulty, provide the aggrieved individual with the benefit of the Commission's "technical perception" at the most appropriate time—when he must decide whether to bring a private action. The majority's invalidation of the rules will force the individual to file an action, and then learn through discovery whether he has a meritorious case. I fail to see how this will promote any of the statute's objectives.

In upholding the right of an individual to bring an action alleging employment discrimination under 42 U.S.C. § 1981, by-passing the administrative remedies entirely, the Supreme Court stated: "Conciliation and persuasion through the administrative process, to be sure, often constitute a desirable approach to settlement of disputes based on sensitive and emotional charges of invidious employment discrimination. We recognize, too, that the filing of a lawsuit might tend to deter efforts at conciliation, that lack of success in the legal action could weaken the Commission's efforts to induce voluntary compliance, and that a suit is privately oriented and narrow, rather than broad, in application, as successful conciliation tends to be. But these are the natural effects of the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies. The choice is a valuable one." *Johnson* v. *Railway Express Agency Inc.*, 421 U.S. 454, 461 (1975). I dissent from the majority's attempt to limit that choice.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78-1695

[Filed Oct. 10, 1979]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLEE

vs.

JOSEPH HORNE COMPANY, A Division of Associated Dry Goods Corporation, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78-1696

[Filed Oct. 10, 1979]

ASSOCIATED DRY GOODS CORPORATION, APPELLEE
vs.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 75-0297-R

[Filed Jul. 18, 1978]

ASSOCIATED DRY GOODS CORPORATION, PLAINTIFF

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., DEFENDANTS

—AND—

Civil Action No. 76-0510-R

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PLAINTIFF

v.

JOSEPH HORNE COMPANY, DEFENDANT

MEMORANDUM

Associated Dry Goods Corporation ("Associated"), plaintiff herein, brings this action to challenge certain practices of defendant Equal Employment Opportunity Commission ("EEOC") relating to disclosure of EEOC investigative files to charging parties. Consolidated with Associated's action is an application by

the EEOC to enforce an EEOC administrative subpoena *duces tecum* against one of Associated's subsidiaries, the Joseph Horne Company ("Horne's"). Jurisdiction is premised upon the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.;* on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.;* and on 28 U.S.C. § 1331.

The facts, briefly stated, are as follows: From November 1971, through June 1973, several employees and former employees of Horne's filed race and sex discrimination charges against Horne's with the EEOC. The EEOC began investigating the charges by serving interrogatories on Horne's in February and April of 1974. Horne's refused to answer the interrogatories without assurances from the EEOC that the answers would not be disclosed to the charging parties, their attorneys, or others. The EEOC could not offer such assurance. Rather, the Commission explained that its policy was to disclose to charging parties both their own case files (including data submitted by the employer in response to Commission interrogatories) and "related case files"—files involving the same employer which were compiled during the investigation of similar charges filed by other individuals. The only conditions attached to such disclosures were that the charging party use the information "in connection with contemplated or pending litigation," and that he or she agree in writing not to make the information public except in the normal course of a civil action or other proceeding instituted under Title VII. The Commission admitted, however, that it had "no

way of preventing charging parties from transmitting information to others.

Lacking the assurance it sought, Horne's continued to withhold the information which the EEOC had requested in its interrogatories. On October 18, 1974, the Commission issued a subpoena for the information. On October 23, 1974, Horne's petitioned for revocation of the subpoena, and on May 9, 1975, its petition was denied.

Horne's did not comply with the subpoena. Instead, on June 27, 1975, Associated (Horne's parent company) filed the instant action, challenging the Commission's disclosure policies and seeking declaratory and injunctive relief. The EEOC moved to dismiss the suit. On June 25, 1976, this Court denied in part and sustained in part the Commission's motion to dismiss. *Associated Dry Goods Corp.* v. *EEOC*, 419 F.Supp. 814 (E.D. Va. 1976). By order of July 8, 1976, the Court instructed the parties to brief the sole remaining issue: whether § 706(b) of Title VII, as civilly invoked, prohibited the EEOC from disclosing investigative materials to charging parties.[1] That issue has now been fully briefed. Additionally, the parties have addressed the closely related issue of whether § 709(e) of Title VII prohibits the EEOC

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[1] Plaintiff is not challenging here the EEOC's disclosure of information in response to subpoenas, demands, or orders of courts to other authorities; or in cases where the EEOC is a party to the litigation; or in response to requests made by representatives of interested federal, state or local authorities. In short, plaintiff is not concerned in the instant case with disclosure to other governmental authorities. (Plaintiff's Supplemental Memorandum at 13, n. 16, filed August 9, 1976).

from disclosing investigative materials to charging parties. These issues are now ripe for disposition.

For the reasons which follow, judgment on the merits will be entered in favor of Associated as to the disclosure issues. At the same time, the EEOC's application for enforcement of its investigative subpoena will be granted, subject to the conditions implicit in the Court's holding on disclosure.

I.

Plaintiff specifically challenges the procedural regulations found at 29 C.F.R. §§ 1601.20 [2] and 1610.17 (d),[3] and the EEOC's "special disclosure rules" con-

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[2] 29 C.F.R. § 1601.20, entitled "Confidentiality", provides as follows:

> Neither a charge, nor information obtained pursuant to § 709(a) of Title VII, nor information obtained from records required to be kept or reports required to be filed pursuant to §§ 709(c) and (d) of said Title shall be made matters of public information by the Commission prior to the institution under this Title of a court proceeding involving such charge or information.
>
> *This provision does not apply to such earlier disclosures to the charging party,* the respondent, witnesses, and representatives of interested federal, state and local agencies as may be appropriate or necessary to the carrying out of the Commission's functions under the Title, nor the publication of data derived from such information in a form which does not reveal the identity of the charging party, respondent or persons supplying the information. [Emphasis added.]

[3] 29 C.F.R. § 1620.17(d) provides as follows:

> *Special disclosure rules apply to the case files for charging parties,* aggrieved persons on whose behalf a

tained in § 83 of the EEOC Compliance Manual.[4] Under these rules and regulations, the EEOC may

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charge has been filed, and entities against whom charges have been filed. Special disclosure rules are available in the public reading areas of the Commission. Under §§ 706 and 709, case files involved in the administrative process of the Commission are not available to the public. [Emphasis added.]

[4] Section 83 of the EEOC Compliance Manual, in pertinent part provides as follows:

Disclosure of Information in Case Files

83.1 *General*—Section 709(e) of Title VII makes it unlawful for any employee of the Commission to make public information obtained by the Commission pursuant to its general authority to investigate charges of discrimination prior to the institution of any proceeding under Title VII. The Fifth Circuit Court of Appeals has held (*Kessler* v. *EEOC*, 472 F.2d 1147 (5th Cir. 1973)) that granting access to such information to charging parties or their attorneys prior to the institution of a proceeding under Title VII is not "making public" within the meaning of that term as used in § 709(e).

. . .

83.3 *Conditions Precedent to Disclosure.* Information in case files may be disclosed on request to the persons indicated in 83.5 under the following conditions:

(a) *In Connection with Pending or Contemplated Litigation.* Information in case files may be disclosed provided that the request is made for the purpose of reviewing information in the case file in connection with pending or contemplated litigation. Access to the information will not be granted prior to the expiration of the 180-day period prescribed at Section 706(f)(1) of Title VII except when the charge has been dismissed or the aggrieved or charging party demonstrates a compelling need for access prior to the expiration of the 180-day period; and

(b) *Persons Requesting Disclosure Must Agree Not to Make the Information* Public. Information in case

furnish materials from its investigative files to employees contemplating private Title VII litigation against employers under investigation by the Commission. It is the plaintiff's contention that this practice contravenes the statutory nondisclosure provisions found at §§ 706(b) and 709(e) of Title VII.

Section 709(e) of Title VII, 42 U.S.C. § 2000e-8(e), provides, in pertinent part:

> It shall be unlawful for any officer or employee of the Commission to *make public in any manner whatever* any information obtained by the Com-

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files may be disclosed only on the condition that the persons requesting disclosure agree in writing not to make the information obtained public except in the normal course of a civil action or other proceeding instituted under Title VII.

83.5 *Persons to Whom Information In Case Files May Be Disclosed.* Information in case files may be disclosed on request, after complying with the expunction requirements discussed in 83.6, to *only* the following persons:

(a) Charging Parties and their attorneys (except as otherwise provided in 83.5(c) below);

(b) Aggrieved persons in case files involving Commissioner Charges and their attorneys provided that such persons have been notified of their status as aggrieved persons pursuant to Section 1601.25(c) of the Commission's Procedural Regulations;

(c) Persons or organizations filing on behalf of an aggrieved person, provided that the aggrieved person has given written authorization to the persons who filed on his or her behalf to act as the aggrieved person's agent for this purpose and their attorneys;

. . .

(e) Respondents and their attorneys, provided that the charging party or aggrieved person has filed suit under Title VII.

> mission pursuant to its [investigative] authority . . . prior to the institution of any proceeding under this subchapter involving such information. [Emphasis added.]

The crucial phrase with respect to the case at bar is "make public". The EEOC argues that charging parties are not members of the "public" for purposes of § 709(e). Thus, the EEOC takes the position that § 709(e) does not bar it from disclosing to charging parties information obtained pursuant to the Commission's statutory investigative powers.

The Court rejects the EEOC's contentions in this regard. The Court's reasoning is aptly expressed by the United States Court of Appeals for the District of Columbia Circuit in the case of *Sears, Roebuck & Co.* v. *EEOC*, Nos. 77-1822, 77-1995 and 77-1996, 16 E.P.D. ¶ 8348 (D.C. Cir., June 9, 1978). Facing nearly the identical issue posed in the instant case, the District of Columbia Circuit stated:

> An examination of the overall statutory scheme persuades us that Title VII was never meant to permit dissemination of EEOC investigative data to anyone not within the government.
>
> . . . It would do violence to the scheme of negotiation and settlement if the Commission were permitted to encourage numerous private litigants by distributing information from EEOC files before the administrative procedures of Title VII had run their course.

16 E.P.D. ¶ 8348, at 5835.

The District of Columbia Circuit also noted in *Sears* that the EEOC had no effective means of con-

trolling the manner in which charging parties used information which they obtained from the Commission's files:

> Although the Commission extracted promises from the requesting parties with respect to some of the information it proposed to distribute in the instant case, such promises obviously are not enforceable against those receiving information. . . . As there is nothing to prevent charging parties from redistributing what they receive from the EEOC to whomever they please, distribution of investigative file data to charging parties would be tantamount to distribution to the public at large.

16 E.P.D. § 8348 at 5836.

Finally, the *Sears* opinion distinguished *H. Kessler & Co.* v. *EEOC*, 472 F.2d 1147 (5th Cir.) (*en banc*), *cert. denied*, 412 U.S. 939 (1973), formerly the leading case interpreting § 709(e). That case held that an individual charging party could be given access to his own EEOC investigative file. The District of Columbia Circuit expressly declined to extend the *Kessler* holding to a situation involving numerous requests by parties bringing related charges, as opposed to the single request by the initial charging party involved in *Kessler*. Moreover, the *Sears* opinion implied that *Kessler* itself might no longer be viable in light of the 1972 amendments to Title VII, none of which were considered in that case. For the same reasons, the Court is of the view that *Kessler* is inapplicable to the case at bar.

In summary, the Court of Appeals for the District of Columbia Circuit held in *Sears* that § 709(e) of Title VII prohibited the EEOC from disclosing its investigative files to anyone outside the government, including charging parties.

The District of Columbia Circuit reached a parallel conclusion in reference to § 706(b) of Title VII, 42 U.S.C. § 2000e-5(b). That section provides, in relevant part:

> Nothing said or done during and as a part of . . . informal endeavors [at conciliation], may be *made public* by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. [Emphasis added.]

Observing that § 706(b) uses essentially the same "make public" language found in § 709(e), and finding no reason to construe the two provisions differently, the Court of Appeals held that § 706(b) prohibited the EEOC from disclosing to parties outside the government any information gleaned from settlement or conciliation negotiations.

This Court finds the reasoning of the District of Columbia Circuit in its *Sears* decision to be persuasive. Moroever, by facilitating and encouraging the conciliation process, the *Sears* interpretation of §§ 706 (b) and 709(e) is in complete harmony with the Fourth Judicial Circuit's recognition that the EEOC's statutory duty to attempt conciliation "is among its most essential functions." *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 272 (4th Cir. 1976).

Consequently, this Court adopts the view stated in *Sears* and will enter judgment on the merits in favor of the plaintiff regarding the validity of the EEOC rules and regulations at issue here.[5]

II.

It remains to consider whether the EEOC's application for enforcement of its subpoena *duces tecum* should be granted. While the plaintiff has advanced extensive arguments against enforcement, the

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[5] By letter of June 28, 1978, counsel for the EEOC made the surprising claim that "the United States Court of Appeals for the Fourth Circuit has already decided the issue of 'making public' under Title VII contrary to the decision reached in *Sears, supra.*" In support of this proposition the EEOC cited *Charlotte-Mecklenburg Hospital Authority* v. *EEOC*, 571 F.2d 195 (1978). The Court has carefully reviewed the *Charlotte-Mecklenburg* case and finds no support for any such contention. *Charlotte-Mecklenburg* was a Freedom of Information Act ("FOIA") case. While §§ 706(b) and 709(e) of Title VII figured in the opinion, disclosure policy regarding investigative files was not in issue because both litigants agreed that Title VII permitted certain disclosures to the charging party and the charged employer. In that posture the case hinged on exemption three of the FOIA and the Court had no reason to analyze the "make public" language of §§ 706(b) and 709(e).

To the extent that *Charlotte-Mecklenburg* does contain an implicit holding on §§ 706(b) and 709(e), however, it is only that certain disclosures from investigative files are permissible to charged *employers*. The decision contains no similar implication regarding charging employees. Indeed, the court apparently left open the issue faced in the instant case, noting that while Title VII did not appear to bar disclosure to a charged employer, "it may prohibit disclosure to some other party." 571 F.2d at 200-201 (footnote omitted).

Court is of the view that the application should be granted.

The EEOC applied for the enforcement of its administrative subpoena *duces tecum* against Horne's on May 24, 1976, in the United States District Court in Pittsburgh, Pennsylvania. On September 28, 1976, that court transferred the enforcement action to this Court for consolidation with the pending action filed by Associated. On March 1, 1977, this Court issued an order effecting consolidation.

The subpoena in question directs Horne's to produce certain records which the EEOC considers relevant to its investigation of specified charges of unfair employment practices against Horne's. Plaintiff's arguments against enforcement will be considered seriatim.

Plaintiff's first contention is that the EEOC never formally approved its Compliance Director's determination on Horne's petition to revoke the subpoena. There is no question that the subpoena was properly issued, that Horne's filed a timely petition to revoke same, and that the EEOC Director of Compliance denied the petition to revoke. Plaintiff's argument focuses on the next step in the administrative process, the full Commission's review and approval of the Compliance Director's denial of the petition. Pursuant to 29 C.F.R. § 1601.15(b), the determination of the Director of Compliance "shall be reviewed by the Commission and unless the Commission decides otherwise shall become final three days thereafter." The heart of plaintiff's argument here is that the

determination of the Director of Compliance was never actually "reviewed by the Commission" because, whereas it takes three members of the Commission to constitute a quorum, only two members apparently reviewed the determination by the Director of Compliance. Thus, plaintiff contends, no Commission action ever occurred with respect to Horne's petition to revoke the subpoena.

The Court is not impressed by this contention. While it may be factual that review of the Compliance Director's determination was conducted by less than a quorum of the Commission, the third Commissioner's absence was in the Court's view immaterial because his vote would not have affected the result. The two votes approving the Compliance Director's determination would most likely have prevailed in any event.[6] Consequently, the Court con-

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[6] Associated's position as set forth in their memorandum filed February 11, 1977, at p. 28, n.64, is as follows:

> Since a single Commissioner may request that a "hold" be placed on any proposed Determination in order to bring the case before the Commission, the failure to have a statutory quorum review the Director of Compliance's suggested disposition may have a decisive impact upon the outcome of the petition.

[Citing EEOC Compliance Procedures Manual, § 24.4(6).]

This position loses viability in light of the fact that the Commission was not at full strength during the relevant time period. Indeed, as Associated recognizes, there were only two active commissioners at the time the Compliance Director's determination was reviewed. Two of the five allocated positions were vacant, and the third commissioner had been hospitalized as a result of a heart attack. Thus, even if the two

siders the apparent deviation from Commission regulations to be *de minimus*, and therefore insufficient grounds for denying enforcement of the Commission's subpoena.

The plaintiff's second argument against enforcement is that the EEOC should be precluded from pursuing its own investigation with respect to charges which are the subject of private Title VII actions. This contention is also unpersuasive. The very case

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active commissioners had waited for the third commissioner to recover, or for a new commissioner to be confirmed, the third commissioner could at best have brought the Horne's petition before the Commission which would have been composed of himself and the two commissioners who had already endorsed the Compliance Director's determination. This is quite different from the normal situation, when the Commission is functioning with its full complement of five active commissioners, for in that situation a third commissioner's "hold" can bring the petition before at least two commissioners who have not yet reviewed the Compliance Director's determination. In that case, a third commissioner's review might often be decisive.

Assuming that a third commissioner had been available to review the Compliance Director's determination, however, his review would have been material only *if* he had placed a "hold" on it, and *if* he had maintained his disagreement with the Compliance Director's determination after hearing the full facts, and *if* one of the other commissioners had joined him by withdrawing his original approval of the subpoena. Only then would Horne's petition to revoke the subpoena have been granted. This set of possibilities is in the Court's view too tenuous to serve as grounds for denying enforcement of the EEOC's subpoena, especially in view of the problems facing the Commission at that time. Congress cannot have intended that the Commission be paralyzed during the entire time it operated with only two active commissioners.

cited by plaintiff in support of its proposition, *EEOC* v. *Duval Corp.*, 528 F.2d 945 (10th Cir. 1976) explicitly states that the EEOC has the right to intervene in any pending private Title VII action. The United States Court of Appeals for the Third Circuit has gone even further, holding that the EEOC has the authority to bring an independent action, even if it is based on the same facts or charges as a previously instituted private Title VII suit. *See EEOC* v. *North Hills Passavant Hospital*, 544 F.2d 664, 672 (3d Cir. 1976). In light of the Supreme Court's holding in *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355 (1977), that EEOC actions are not subject to any statute of limitations, intervention or independent action by the EEOC with respect to the private litigation under way against Horne's remains a realistic possibility. The fact that private litigation is pending therefore provides no grounds for denying enforcement of the EEOC investigative subpoena.

Plaintiff's final argument is that enforcement of the subpoena should be denied on grounds of laches. It is the law of this Judicial Circuit that laches will not bar enforcement of an EEOC investigative subpoena "when neither prejudice to the employer nor misconduct by the agency has been established." *EEOC* v. *South Carolina National Bank*, 562 F.2d 329, 333 (4th Cir. 1977). *Accord, EEOC* v. *Exchange Security Bank*, 529 F.2d 1214, 1216-17 (5th Cir. 1976). Plaintiff alleges both prejudice and agency misconduct, but its arguments must fail.

Regarding prejudice, plaintiff's position is that because the EEOC delayed in seeking enforcement of its subpoena, Horne's has been forced to defend simultaneously against the private litigation and the EEOC enforcement action for many months. Since the EEOC has the right to continue its investigative efforts after private litigation has been initiated, however, *see EEOC* v. *North Hills Passavant Hospital*, *supra*, the alleged prejudice results not from the EEOC's delay in seeking enforcement, but rather from the extent of the EEOC's investigative authority under Title VII. Such "prejudice" is not grounds for this Court to deny enforcement of an EEOC subpoena.

Regarding agency misconduct, plaintiff notes that the EEOC, upon bringing its enforcement action in the United States District Court in Pittsburgh, failed to inform that court that it was already defending a related action pending in this Court. Moreover, plaintiff points out that although the EEOC urged this Court to dismiss Associated's action for lack of subject matter jurisdiction on grounds that the Commission had not yet moved to enforce its subpoena, the EEOC failed to notify this Court when the enforcement action was filed in Pittsburgh. In the same vein, plaintiff urges that the eleven month delay between the filing of Associated's action in this Court and the filing of the EEOC's enforcement action in Pittsburgh was motivated by the Commission's desire to gain a tactical advantage in its motion to dismiss Associated's pending action in this Court. Finally,

plaintiff cites certain procedural irregularities in the issuance of the subpoena, including the lack of a quorum in reviewing the Compliance Director's determination, a matter which the Court has already dismissed as immaterial. While the Court would characterize the procedure of the Commission in issuing and enforcing this subpoena as unusual, the Court is not satisfied that such procedure sinks to the level of "misconduct" warranting denial of enforcement of an EEOC subpoena.

As plaintiff has established neither prejudice nor misconduct to the satisfaction of the Court, the EEOC's application for enforcement of its subpoena *duces tecum* will be granted. Disclosure of the information obtained via the subpoena will, of course, be limited by the Court's decision regarding §§ 706(b) and 709(e) of Title VII.

III.

Finally, the Court must address plaintiff's request for an award of reasonable counsel fees and other litigation costs in connection with its defense against the EEOC's subpoena enforcement action. Under § 706(k) of Title VII, such fees can properly be awarded only to a "prevailing party". 42 U.S.C. § 2000e-5(k). Since plaintiff has not prevailed in its efforts to deny enforcement of the subpoena, this Court is without authority to award attorney's fees as requested.

IV.

To summarize the Court's holdings:

(1) The EEOC's application to enforce its investigative subpoena *duces tecum* will be granted;

(2) The EEOC is prohibited from disclosing the information so obtained to any charging party, and any EEOC rules and regulations to the contrary are invalid; and

(3) Plaintiff's request for attorney's fees will be denied.

An appropriate order will issue.

/s/ Robert R. Merhige, Jr.
ROBERT R. MERHIGE, JR.

United States District Judge

Date: Jul 18 1978

APPENDIX E

EEOC COMPLIANCE MANUAL
SECTION 83

DISCLOSURE OF INFORMATION IN CASE FILES

83.1 *General*—Section 709(e) of Title VII makes it unlawful for any employee of the Commission to make public information obtained by the Commission pursuant to its general authority to investigate charges of discrimination prior to the institution of any proceeding under Title VII. The Fifth Circuit Court of Appeals has held (*Kessler* v. *EEOC* 472 F.2d 1147 (5th Cir. 1973) that granting access to such information to charging parties or their attorneys prior to the institution of a proceeding under Title VII is not "making public" within the meaning of that term as used in Section 709(e).

83.2 *Exceptions*

(a) *Disclosure of Information in Response to Subpoenas, Demands or Order of Courts or Other Authorities*—The procedures and policies of this section do not apply to disclosures of information from case files in response to subpoenas, demands or orders of courts or other authorities. The procedures in subpart B of the Commission's Regulations on Availability of Records (29 CFR 1610.30 through 1610.36) are to be followed in these circumstances.

(b) *Disclosure of Information When the Commission is a Party to Litigation*—Once a case file has been referred to Office of General Counsel to be used in litigation to which the Commission is a party or in any other case where the Commission is a party to litigation, the Office of General Counsel will control disclosures of information and all persons requesting disclosure from District Offices or Office of Systemic Programs (OSP) will be referred to the Office of General Counsel as provided in Section 1610.34 of the Commission Regulations.

(c) *Disclosures of Information in Case Files to Representatives of Interested Federal, State or Local Authorities*—The procedures and policies of this section do not apply to disclosures of information in case files to representatives of interested Federal, State or local agencies. Such disclosures are to be made as appropriate and necessary to carrying out the Commission's responsibilities under the law in accordance with Section 709(b) of Title VII and Section 1601.22 of the Commission's Procedural Regulations.

83.3 *Conditions Precedent to Disclosure*—Information in case files may be disclosed on request to the persons indicated in 83.5 under the following conditions:

(a) *In Connection With Pending or Contemplated Litigation*—Information in case files may be disclosed provided that the request is made for the

purpose of reviewing information in the case file in connection with pending or contemplated litigation. Access to the information will not be granted prior to the expiration of the 180 day period prescribed at Section 706(f)(1) of Title VII except when the charge has been dismissed, the aggrieved or charging party demonstrated a compelling need for access prior to the expiration of the 180 day period; or if aggrieved person has been issued a requested Notice of Right to Sue.

(b) *Persons Requesting Disclosure Must Agree not to Make the Information Public*—Information in case files may be disclosed only on the condition that the person requesting disclosure agree in writing not to make the information obtained public except in the normal course of a civil action or other proceeding instituted under Title VII.

83.4 *Use of EEOC Form 167, Agreement of Nondisclosure (See Exhibit 83-A)*—Each person to whom disclosure is made will sign a separate EEOC Form 167, Agreement of Nondisclosure, check the appropriate block to indicate identification and provide a complete address and telephone number. Completion of EEOC Form 167 will be accepted as evidence that the conditions in 83.3 are agreed to by the person requesting disclosure. The Commission representative who signs the EEOC Form 167 on behalf of the Commission will normally be the District Counsel, District Director or other responsible professional employee in a supervisory position. Re-

tain the original in the case file. A copy may be provided to the person requesting disclosure, if requested.

83.5 *Persons to Whom Information in Case Files May be Disclosed*—Information in case files may be disclosed on request, after complying with the expunction requirements discussed in 83.6, to *only* the following persons:

(a) Charging Parties and their attorneys (except as otherwise provided in 83.5(c) below);

(b) Aggrieved persons in case files involving Commissioner Charges and their attorneys provided that such persons have been notified of their status as aggrieved persons by the Commission;

(c) Persons or organizations filing on behalf of an aggrieved person, provided that the aggrieved person has given written authorization to the person who filed on his or her behalf to act as the aggrieved person's agent for this purpose and their attorneys;

(d) Employees of Commission funded groups such as the Mexican-American Legal Defense and Education Fund and Lawyer's Committee for Civil Rights Under Law for the purpose of reviewing information in case files to determine the appropriateness of referral to private attorneys as a service to charging parties, provided that the conditions in 83.4 and 83.6 have been met and that the Commission funded group is reviewing the information at the request of the charging party;

(e) Respondents and their attorneys, provided that the charging party or aggrieved person has filed suit under Title VII; and

(f) Any party in a class action complaint, provided that such party is actually named in the complaint as filed in Federal district court or is actually named by court order as a class member.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

AGREEMENT OF NONDISCLOSURE

Pursuant to Section 705g(1) of Title VII, the EEOC shall have power to cooperate with private individuals in order to accomplish the purposes of Title VII.

PERSON REQUESTING DISCLOSURE

☐ CHARGING PARTY	☐ RESPONDENT	☐ AGGRIEVED PERSON ON WHOSE BEHALF CHARGE IS FILED	☐ AGGRIEVED PERSON IN COMMISSIONER CHARGE	☐ NAMED PARTY IN CLASS ACTION

ATTORNEY REPRESENTING

☒ CP ☐ RESPONDENT ☐ AGGRIEVED PERSON ON WHOSE BEHALF CHARGE IS FILED ☐ AGGRIEVED PERSON IN COMMISSIONER CHARGE ☐ NAMED PARTY IN CLASS ACTION

CASE CHARGE NUMBER OF FILE(S) TO BE DISCLOSED

YPB4-1151 and YPB4-1152

STATEMENT

I John V. Evans (Typed name), request disclosure of Commission case file(s) in connection with contemplated or pending litigation. I agree that the information disclosed to me will not be made public or used except in the normal course of a civil action or other proceeding instituted under Title VII involving such information.

In witness whereof, this agreement is entered into as of the 5th day of May 19 75, by the Equal Employment Opportunity Commission representative named below and the person requesting disclosure.

John V. Evans 999-919-1010

Requesting disclosure (Signature and telephone number/area code)

Lopez, Evan and Fenwick, 1802 Dawn St., Point Barrow, Alaska 99999

Complete address

Jane Jones

Jane Jones, District Counsel, Point Barrow District Office

EEOC representative (Signature and title)

EEOC FORM MAY 75 167

Exhibit 83-A

83.6 *Expunction of Confidential Material From Case Files Prior to Disclosure*

(a) *General*—Expunction of confidential material pursuant to this section will be strictly supervised by the District Counsel or Litigation Enforcement Division staff in OSP, the District Director, Director of the Office of Systemic Programs or another responsible professional employee in the absence or non-availability of an attorney or the District Director. Supervision of expunction will not be further sub-delegated to non-professionals.

(b) *Statements and Identities of Witnesses Promised Anonymity*—Remove any information concerning the identities of and statements by witnesses who have been promised anonymity by a Commission representative during the course of investigation or conciliation. The statements of such witnesses are to be clearly marked by the Commission representative who promised anonymity by placing the words "Confidential Witness—Do Not Disclose this Statement" at the top and bottom of each page of each statement. The confidential witness's name is to be followed by the words "Confidential Witness" when used on the index to tabs in the case file. The name is to be obscured and the index photocopied so that only the words "Confidential Witness" appears on the index provided to persons requesting disclosure. A similar procedure is to be followed each place the confidential witness's name or information obtained from the witness appears in the case file.

(c) *Review Sheet on Commission Decisions*—Remove the review sheet covering Commission Decisions before disclosure because this review sheet records information concerning intra-governmental advisory and deliberative communications.

(d) *Intra-Agency and Inter-Agency Memoranda*—Remove the Investigator's Memorandum. Remove all memoranda, notes and other documents prepared by Commission attorneys or received from other governmental agencies which contain recommendations or mental impressions as to strategy for settling the case or litigation. Remove all memoranda or notes from Regional Office of the General Counsel, from Office of General Counsel and from the Department of Justice.

(e) *Any Data on Other Respondents*—Remove all data naming other respondents which may be contained in the case file. The names of other respondents usually will be contained on EEOC Form 155, if charging party has filed charges against other respondents or on deferral correspondence which sometimes includes lists of charges deferred. The name of other respondents is to be obscured from such documents before disclosure.

(f) *Conciliation Materials*—Remove information in the case file which concerns the Commission's attempts to settle the charge by the informal methods of conference, conciliation and persuasion but see also Section 1601.26(b) of the Commission's Procedural Regulations which provides that factual information obtained by the Commission during the

course of such informal endeavors may be disclosed provided that the factual information was otherwise obtainable by the Commission under its authority in Section 709 of Title VII.

Materials which *must* be removed include: EEOC Form 134, Conciliation Case Analysis; EEOC Form 159, Log of Investigative/Settlement Actions, EEOC Form 180, Conciliation Benefits; Commission, Charging Party and Respondent proposals and counter proposals (and all correspondence or other documents which contain information customarily contained in the items cited) and any statement by any party which could be construed as an admission against interest. EEOC Form 153, Invitation to Participate in Settlement Discussions, will be disclosed. If in doubt as to whether or not the factual information obtained during informal endeavors to settle the charge is obtainable under the Commission's investigatory powers, remove the information.

(g) *Information Obtained From OFCCP or Contract Compliance Agencies Under the EEOC/OFCCP Memorandum of Understanding*—All information obtained from OFCCP or any of its constituent contract compliance agencies pursuant to the Memorandum of Understanding, paragraph 5, will be removed. (See also 28-13 and 83.7(b)).

83.7 *Scope of Disclosure Permitted*

(a) *Employer Information Reports (EEO-1) or other Reports Prescribed by the Commission Pursuant to Section 709(c)*—All reports required by the

Commission from respondents covered by Title VII such as Employer Information Report (EEO-1, State and Local Government Information Report (EEO-4)) will be disclosed if available in the District Office or Office of Systemic Programs notwithstanding the fact that these reports were not actually in the charging party's case file.

(b) *Information in Case Files Obtained From OFCCP or Contract Compliance Agencies Under the EEOC/OFCCP Memorandum of Understanding*— Paragraph 5 of the Memorandum of Understanding between EEOC and OFCCP signed September 11, 1974 provides as follows:

> "All requests by third parties for the disclosure of information shall be referred to the agency which initially compiled or collected the information."

All information obtained from OFCCP or its constituent contract compliance agencies pursuant to this agreement will not be disclosed. Persons, as defined under Section 83.5, who are entitled to disclosure under Section 83.3 will be informed that the OFCCP material in the file can be requested directly from the Office of Federal Contract Compliance Programs and will be provided with page numbers or other identifying information to aid in making such requests. Requests for information by any persons made under the Freedom of Information Act and not under Section 83 will be referred to the agency which initially compiled or collected the information in accordance with Section 1610.6 of the Commission regulations and

the EEOC Order 151, Disclosure of Information Under the Freedom of Information Act (but also see 83.2(c)).

(c) *Other Case Files Involving the Same Respondent*

(1) *General*—The Commission's policy is to cooperate with private Title VII litigants and to lend appropriate assistance in framing proper court complaints by allowing, when requested, access to information in other case files involving the same respondent which are available in the same District Office or Office of Systemic Programs, provided that the information in the other case files is relevant or material to the private litigant's case.

(2) *Determining When Information in Other Case Files is Relevant or Material*—Information in other case files is relevant or material when other case files contain charges, investigations or determinations involving the same basis (e.g. sex, religion, national origin, race) with limited exceptions such as when the private litigant's case alleged discrimination in promotion against females and the other case file involved a male's claim that he was not hired because of respondent's policy of not hiring long haired males. Other case files may be relevant or material if they involve a different basis only when the treatment afforded one protected class is probative of treatment afforded the private litigant's class (e.g. systemic discrimination against Spanish Surnamed Americans is often probative as to treatment accorded Blacks and vice versa).

(3) *Safeguard the Identity of Person on Whose Behalf Charge was Made When Disclosing Other Case Files Involving the Same Respondent*—Section 1601.7(a) of the Commission's Procedural Regulations provides that the Commission shall safeguard and keep confidential the name and address of any person on whose behalf a charge is made, where the person requests that his or her identity remain confidential. When disclosing information in other case files involving the same respondent, remove any material which would reveal the name or address of any person on whose behalf a charge was made including EEOC Form 151, Third Party Certification of Charge, (or any other document serving the same purpose), the affidavit required by 8.3(c) in which the person on whose behalf a charge is made acknowledges aggrievement or any other documents which contain the name or address of the person on whose behalf a charge was made. When constructing the case file, a procedure similar to that described in 83.6(b) is to be followed, i.e. clearly mark the index tabs in the case file and mark each document which contains information which the Commission is required to safeguard pursuant Section 1601.7(a) of the Commission's Procedural Regulations.

(4) *Safeguard The Identities of Charging Parties When Disclosing Other Case Files Involving the Same Respondent*—When disclosing information in other case files involving the same respondent, remove any materials which would reveal the name or

address (or other identifying details) of any charging party in the other case files.

(5) *District Director or Director, OSP, Decision as to Relevant or Material is Final*—Because the policy of allowing access to information in other case files is discretionary on the part of the Commission, the decision of the District Director or Director, OSP, is final when made and may not be appealed. However, any District Director or Director, OSP, may reconsider on his or her own motion any decision made as to relevancy.

83.8 *Collection and Disposition of Fees For Copying*—Fees for photocopying will be assesed or waived in accordance with the schedule of fees contained at Section 1610.15 of the Commission's Regulations. Collection and disposition of fees will be in accordance with EEOC Order 471. Persons granted access to information in case files will not normally be permitted to remove case files from Commission premises except that the District Director or Director, OSP, may allow a file to be copied away from Commission premises if unusual circumstances warrant and proper safeguards are observed to prevent loss or mutiliation of the file. District Office or Office of Systemic Programs personnel will photocopy materials on request; however, if a request for photocopying involves unusual problems or reproduction or handling, District Director or Director, OSP, may require persons requesting copies to make special arrangements. Persons granted access are to be

encouraged to minimize the amount of photocopying by Commission employees by first carefully inspecting the information in the case file and making a judicious selection of the material to be photocopied.

83.9 *Copy of This Section Will be Provided to Persons Who Sign EEOC Form 167*—A photocopy of this section will be provided to persons who sign an EEOC Form 167 at no cost.

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